IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.04.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.712 of 2000

M/S.Madras Cements Limited,
Rep by its Accountant
Mr.P.Gurunathan ..Appellant/Complaint

vs.

K.Gunasekaran ..Respondent/Accused

Prayer: This Appeal filed under Section 378 of the code of Criminal and it has been preferred against the judgment dated 31.05.2000 made in C.C.No.2748 of 1994 on the file of the VII Metropolitan Magistrate, George Town, Chennai.

For Appellant : Mr.M.Arvind Kumar
For Respondent : Mr.P.Palaninathan, Legal Aid Counsel

ORDER

This appeal has been preferred against the judgment in C.C.No.2748 of 1994 on the file of the VII Metropolitan Magistrate, Chennai, dated 31.5.2000. The private complaint was preferred under Section 200 of Cr.P.C., by the complainant against the accused for an offence under Section 138 of the Negotiable Instruments Act.

2. The brief facts in the complaint relevant for the purpose of deciding this appeal are as follows:-

The complainant is indulged in cement business in the name of Ram Co Cements. The accused used to purchase cement bags from the complainant on credit basis. As per the statement of accounts as on 30.4.1994 a sum of Rs.3,50,250/- was the amount due from the accused to the complainant. To discharge the above said debt the accused had drawn a cheque for Rs.3,50,250/- on 30.4.1994 in the name of the complainant, which on presentation in State Bank of India, Commercial Branch, Chennai, was returned with an endorsement that there was no sufficient funds in the account of the accused. A statutory notice under Section 138 of the Negotiable Instruments Act was issued by the complainant to the accused. The accused had received the notice and sent a letter dated 11.1.1995 but not chosen to repay the cheque amount. Hence, the complaint.

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3. The said complaint was taken on file by the learned Magistrate after recording the sworn statement of the complainant. On appearance of the accused on summons copies under Section 207 of Cr.P.C., were furnished to the accused and when the offence was explained to the accused he pleaded not guilty. On the side of the complainant P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.7 were exhibited.

4. When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., the accused would deny his complicity with the crime.

5. The accused has examined himself as D.W.1 besides examining one Shankaranarayanan as D.W.2 and exhibited Ex.D.1 to Ex.D.8 on his side.

6. After going through the oral and documentary evidence the learned Magistrate had come to the conclusion that the guilt against the accused has not been proved by the complainant beyond any reasonable doubt and accordingly the learned Magistrate has acquitted the accused under Section 255(1) of Cr.P.C., which necessitated the complainant to prefer this appeal.

7. Now the point for determination in this appeal is whether the offence under Section 138 of the Negotiable Instruments Act has been made out against the accused to warrant conviction under the above provision of law?

8. The Point:-

8(a) The appeal has been preferred against the acquittal. As per the dictum laid down by the Honourable Apex Court as well as by this Court in various ratios the point to be gone into in an appeal against acquittal is whether the judgment of the trial Court is perverse in nature to warrant interference. Relying on Ex.P.7, letter dated 11.1.1995 written by the accused to the complainant, the learned trial judge has held that the entire debt amount has been discharged by the accused under several installments as stated in Ex.P.7. But a perusal of Ex.P.7 will go to show that the accused has given only an undertaking to repay the debt amount in installments ranging from January 1995 to August 1995. The mere fact that the letter of undertaking was given on 11.1.1995 under Ex.P.7 will not absolve the accused from his liability.

8(b) The only point to be considered in this case is whether an offence under Section 138 of the Negotiable Installments Act has been made out against the accused or not? To find a person guilty under section 138 of the Negotiable Installments Act the ingredients are, a cheque should have been drawn by a person for payment of any amount of money to another person from that of an account maintained by him in a bank in order to discharge in whole or in part of any debt or other liability and when the said cheque was presented by the payee to the bank for collection it

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should have been dishonoured by the bank with an endorsement. As per the above said provision of law under Section 138 of the Negotiable Instruments Act a debt or other liability means a legally enforceable debt or other liability. It is the case of the complainant as P.W.1 that as per Ex.P.8, statement of account for the transaction in respect of the purchase of cement bags by the accused from the year 1991, the amount due from the accused to the complainant as on 30.4.1994 was Rs.3,50,250/-. The accused has examined himself as D.W.1. In the cross-examination D.W.1/accused has admitted Ex.P.8, statement of account. He would further admit that he has not sent any reply to Ex.P.5-notice issued by the complainant. He would say that after the receipt of Ex.P.5 notice and also after the filing of the complaint he has paid Rs.20,000/- which has been admitted by the complainant. So the observation of the learned trial judge that under E.P.7 the accused has discharged the entire debt due under Ex.P.2-cheque holds no water and the observation of the learned trial Judge is perverse in nature. The learned trial judge has further observed that in Ex.P.2, bounced cheque, except the signature of the accused and the name of the complainant all other particulars have been filled up by another person and on that score the learned trial judge has observed that Ex.P.2-cheque has been forged, forgetting for a moment the provision contemplated under Section 139 of the Negotiable Instruments Act. Section 139 of the Negotiable Instruments Act runs as follows:-

> "Presumption in favour of holder:- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability."

It is pertinent to note in this case that the accused has not taken any steps to prove that Ex.P.2 is a forged document by way of sending the same to Forensic Science Laboratory to get an expert's opinion in this regard.

8(c) The learned counsel appearing for the accused at this juncture would contend that the accused has issued six cheques dated 31.3.1994 and those cheques were stopped payment by giving an advise by the accused to the concerned bank. But there is absolutely no evidence on record to show that a similar advise was given by the accused to the bank in respect of Ex.P.2-cheque drawn on 30.4.1994 for Rs.3,50,250/-. Ex.P.7, letter dated 11.1.1995 written by the accused to the complainant, itself will go to show that the accused has admitted his liability and has given an undertaking to pay the said sum of Rs.3,50,250/- in eight installments commencing from January 1995 to August 1995. Under such circumstances, the contention of the learned counsel for the accused cannot be sustainable. The learned counsel for the accused would also make a futile attempt, relying on the evidence of D.W.1 in the chief-examination that after filing of the suit the Assistant in the Account Section of the complainant company sent a word for him and only under his compulsion in order to continue the trade he was asked to give Ex.P.7 letter of undertaking. If it is so, then the accused would have sent a notice to the complainant stating that under threat, coercion and misrepresentation

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Ex.P.7 was obtained from him and on that score would have demanded for return of the same. On the other hand in the cross-examination he would admit that Ex.P.7 was written by him and that he has given details about the repayment to be made from January 1995 to August 1995. He would further admit that subsequent to Ex.P.7-letter he has paid Rs.20,000/-. Under such circumstances, the defence taken by the accused that Ex.P.2 is a forged document and Ex.P.7-letter was obtained under threat or misrepresentation cannot be believable at all.

8(d) Another vain attempt taken by the accused by way of defence is that about 1000 bags of cement supplied by the complainant were received in a damaged condition. But he is not very sure about the quantity of the cement bags supplied by P.W.1 in a damaged condition. In the cross-examination on 27.11.1998 D.W.1/accused would depose that about 1000 damaged cement bags were supplied by the complainant. Subsequently in the re-examination on 11.12.1996 D.W.1/accused would depose that 1200 cement bags got damaged. Further he would admit that even in Ex.D.3-letter dated 5.11.1992 written by the accused to the complainant he has not mentioned about the supply of 1000 cement bags in a damaged condition by the complainant to the accused. In the cross-examination dated 30.4.1997 D.W.1/accused would admit that he has not written a letter the complainant complaining that the complainant's company had supplied 1000 damaged cement bags to him. But he would say that from the complainant's company some of the officials came and inspected the damaged goods but he has not produced any document to show that the officials of the complainant's company made a spot inspection in the premises of the accused and took an inventory for the damaged cement bags amounting to 1000 bags. But the learned counsel appearing for the appellant would bring to the notice of this Court that for the damage occurred in the supply of cement in the year 1972, i.e., on 17.1.1992 a sum of Rs.1,172/65 was paid towards compensation for the damage caused to the accused. This has been reflected in Ex.P.8-statement of accounts at page 2. Under such circumstances, the findings of the learned trial judge on the above said reasoning are not a sound one. On the other hand from the evidence of P.W.1 to P.W.3 it has been proved that on 30.4.1994 the accused had drawn a cheque for Rs.3,50,250/- for the amount due to the complainant as per Ex.P.8 which was dishonoured by the bank on the ground 'no sufficient funds' in his account, which attracts an offence under Section 138 of the Negotiable Instruments Act.

8(e) When coming to the question of sentence as held in 2004(2) SCC 235 (Goa Plast (P) Ltd., Vs. Chico Ursula D'souza), I am of the view that instead of sending the accused to imprisonment and to slap a fine, a compensation double the cheque amount can be awarded. The relevant observation in the above said dictum for the purpose of this case are as follows:-

> "It has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person

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who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd. Vs. Kunchil Kumar Nandi (1998) 3 SCC 249. On same facts is the decision of this Court in Ashok Yeshwant Badave Vs. Surendra Madhavrao Nighojakar (2001)3 SCC 726. The decision in Modi case overruled an earlier decision of this Court in Electronics Trade & Technology Development Corpn. Ltd Vs. Indian Technologists & Enginoors (Electronics) (P) Ltd. (1996) 2 SCC 739 : 1996 SCC (Cri) 454, which had taken a contrary view. We are in respectful agreement with the view taken in Modi case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.

.....

..... We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the

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punishment for the offence under Section 138 of the Act.

The object and the ingredients under the provisions, in particular, Section 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforsaid provisions. The remedy available in a civil court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

Under such circumstances, I am of the view that the judgment of the trial court in C.C.No.2748 of 1994 on the file of the VII Metropolitan Magistrate, Chennai, is liable to be set aside for the reasons stated about. Point is answered accordingly.

9. In the result, the appeal is allowed and the judgment in C.C.No.2748 of 1994 on the file of the VII Metropolitan Magistrate, Chennai, is set aside and the accused is convicted under Section 138 of the Negotiable Instructions Act and was directed to pay a sum of Rs.7,00,500/- (double the cheque amount) to the complainant within a period of two months from this date. This Court records its appreciation of the service rendered by the learned legal aid counsel Mr.P.Palaninathan, Advocate, and his remuneration is fixed as Rs.3000/- (Rupees three thousand) only to be paid by the State Legal Services Authority, to the legal aid counsel.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The VII Metropolitan Magistrate, Chennai.

2. -Do-Thro' The Chief Metropolitan Magistrate,
   Egmore, Chennai - 8.

3. The State Legal Services Authority,
   High Court Buildings, Madras.

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